FILE COPY

FILED
NOV 12 193
CHARLES ELMORE CR
CL

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 543

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

NOAH MOQUIN, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE SUPREME COURT OF THE STATE OF MINNESOTA AND BRIEF IN SUPPORT THEREOF.

HENRY S. MITCHELL,
1427 *First Nat'l-Soo Bldg.,*
Minneapolis, Minnesota,
Counsel for Defendant and Petitioner.

JOHN E. PALMER,
JAMES L. HETLAND,
1427 *First Nat'l-Soo Bldg.,*
Minneapolis, Minnesota,
Of Counsel.

(35,465)

INDEX.

Subject Index.

	Page
Petition for certiorari	1
Summary statement	2
Reasons for the writ	3
First point:	
Error in excluding the defense that respondent's injuries were due to his voluntarily electing to exchange a safe for an unsafe place to work	3
Second point:	
Error in authorizing the jury to grant recovery for injuries caused by an unsafe condition which respondent was engaged in remedying	3
Third point:	
Error in authorizing the jury to find petitioner negligent without finding that it failed to use ordinary care and prudence	3
Fourth point:	
Error in basing judgment on a verdict corrupted by passion and prejudice	4
Brief in support of petition	5
Opinions of the court below	5
Jurisdiction	5
Date of judgment to be reviewed	5
Specific claims and rulings below	5
First point	5
Second point	6
Third point	7
Fourth point	7
Statutory provision for jurisdiction	8
Cases sustaining the jurisdiction	8
Statement of the case	9
Assigned errors to be urged	11
Argument	11
First point	11
Second point	14
Third point	16
Fourth point	20

Table of Cases.

	Page
Adskim v. Oregon-Washington R. & Nav. Co., 276 Pac., 1094	19
Ark. Cattle Co. v. Mann, 130 U. S., 69	8, 23
Atlantic Coast Line R. R. Co. v. Burnette, 239 U. S., 199	8, 24
Atlantic Coast Line R. R. Co. v. Davis, 279 U. S., 34	8, 14
Atlantic Coast Line R. R. Co. v. Driggers, 279 U. S., 787	8, 14
Central Vermont Ry. v. White, 238 U. S., 507	24
C., M. & St. P. Ry. Co. v. Coogan, 271 U. S., 472	8, 16
Craig v. Cook, 28 Minn., 232	23
Ewing v. Stickney, 107 Minn., 217	23
Flannery v. Chicago, M. & St. P. Ry. Co., 158 Minn., 384	23
Kansas City Southern Ry. Co. v. Billingslea, 116 Fed., 335	16
Masteller v. Great Northern Ry. Co., 100 Minn., 236	23
N. Y. C. R. R. Co. v. Johnson, 279 U. S., 310	20
Roemer v. Schmidt Brewing Co., 132 Minn., 399	23
St. L., I. M. & S. Ry. v. Taylor, 210 U. S., 281	8, 16
Seaboard Air Line v. Horton, 233 U. S., 492	8, 16

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 543

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

NOAH MOQUIN, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully shows that it seeks herein a review by this Court of the final judgment of the Supreme Court of Minnesota, the court of last resort of that State, awarding respondent damages in the sum of $23,870.39, and affirming the judgment of the District Court of Minnesota, Crow Wing County, in his action under the Federal Employers' Liability Act

1d

(35 Stat. 65) to recover for injuries sustained while employed by petitioner as a brakeman in interstate commerce.

Summary Statement of the Matter.

Respondent precariously stood on top of a box car pushed by a locomotive moving backwards along a "house track" where there was ice on the roadbed not high enough to endanger car movements, drifted snow over the top of the rails, and *alleged* ice on the rails at one place. The backward movement was preparatory to a forward "flanging" movement of the locomotive to remove the snow from the rails with small snow plows at the front end of the locomotive. He sustained his injuries in falling from the car when it was derailed in the preliminary backward movement.

(1) The Court excluded petitioner's defense that respondent was on the car unnecessarily in violation of his duty to be on the ground at a highway crossing over which the car was backed, for the purpose of protecting traffic.

(2) The Court instructed the jury that it might find petitioner liable to respondent if it found that the derailment was caused by "snow and ice" making the track unsafe, eliminating the question of fact whether it was caused, as respondent contended, by ice on the rails which was not removable by "flanging," or, as petitioner contended, by packed snow over the rails which was so removable.

(3) The jury was charged that it might find petitioner negligent with respect to the condition of the track, without specifying any necessity of finding that petitioner failed to use ordinary care and prudence in that respect.

(4) The judgment against petitioner was based on a verdict which the Court found was influenced by passion and prejudice.

Reasons Relied on for the Allowance of the Writ.

Petitioner was deprived of the benefit of applicable principles of the common law as interpreted by the Federal Courts in that:

(1) Exclusion of this defense violated the principle that there can be no recovery for injuries sustained through voluntarily electing to exchange a safe for an obviously unsafe place to work.

(2) This instruction permitted the jury to find petitioner liable to respondent even if it found that his injuries were caused by an unsafe condition of snow over the rails in remedying which (through "flanging") he was participating by watching the crossing, in his own way, from the top of the car.

(3) This charge violated the principle that there can be no recovery for negligence in not furnishing a safe place to work, unless based on failure to exercise ordinary care and prudence to have the place in reasonably safe condition for the work to be done.

(4) Allowing judgment to be entered on a verdict corrupted by passion and prejudice was contrary to the principle that judgment may not be based on a verdict thus tainted.

WHEREFORE petitioner, referring to the attached brief in support of its reasons for review, respectfully prays that this Court issue a writ of certiorari directed to the Supreme Court of Minnesota to certify and send to this Court a full and complete transcript of the record herein, to the end that the case may be reviewed and determined by this Court as provided by law, and that the decision of the Supreme Court of Minnesota may be reversed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray, etc.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
By HENRY S. MITCHELL,
Counsel for Petitioner.

JOHN E. PALMER,
JAMES L. HETLAND,
Of Counsel.

BRIEF IN SUPPORT OF THE PETITION.

Opinions of the Court Below.

There are two opinions of the Minnesota Supreme Court in this case. The first, filed on June 27, 1930, and reproduced at R. 670-678, affirmed the rulings of the trial Court assigned as error on the first appeal, but ordered the damages to be reduced. The second, filed on August 8, 1930, and reproduced at R. 695, affirmed the judgment so reduced and the rulings of the trial Court assigned as error on the second appeal, for the reasons stated in the former opinion. They have not been reported officially.

Jurisdiction.

The judgment to be reviewed was filed in the Supreme Court of Minnesota on August 19, 1930 (R. 698).

The jurisdiction of this Court is invoked on the basis of the following specific claims advanced and rulings made in the lower courts:

(1) Petitioner requested a charge that respondent could not recover if the jury found that he "voluntarily chose an unsafe and dangerous method of doing his work when there was a safe method open to him" (R. 635). It requested the Court to submit to the jury the question whether "it was the duty of plaintiff to

remain on the ground and protect traffic over the crossing" (R. 635). Also to charge that if the jury so found its verdict must be for petitioner (R. 635). The trial Court denied those requests (R. 632). It charged the jury that "this rule (requiring respondent to precede the cars over the crossing) is not to be considered by you for any purpose" (R. 608). Petitioner assigned error as to all those rulings in the Supreme Court of Minnesota (R. 686, 689). That Court affirmed them on the ground that violation of the rule could not have caused the injury (R. 674, 678, 698).

(2) Petitioner excepted to the Court's instructions to the jury "that it was the obligation of the defendant to keep the tracks at Cloverton reasonably free from snow and ice" (R. 624). This included the instruction that the main question was whether petitioner was negligent in that it "permitted ice and snow to accumulate upon this track and so rendered it in an unsafe condition" which made no distinction as to snow removable by flanging (R. 599). In moving to set aside the verdict petitioner quoted those instructions as being erroneous (R. 645, 647); and assigned error in "authorizing" the jury to award respondent damages "by reason of ice and snow" on the track in view of the evidence that he was "participating" in a flanging movement (R. 643). The trial Court denied that motion (R. 667). In the Minnesota Supreme Court petitioner assigned error "in authorizing the jury to grant recovery to plaintiff for injuries caused by defective conditions which plaintiff and the other members of his train crew were engaged in remedying" (R. 690).

That Court held that an instruction "that an employee cannot recover damages for injury caused by the defect which his work required him to repair" would have been proper, but that failure to give it was not error because it was not requested (R. 675, 676). It did not mention the point that the instruction actually given and excepted to affirmatively authorized recovery for an injury so caused.

(3) Petitioner excepted to the charge that "it was the obligation of the defendant to keep the tracks at Cloverton reasonably free from snow and ice," wherein the standard of ordinary care and prudence was not mentioned (R. 624). It assigned error in the Minnesota Supreme Court in not charging the jury that petitioner was bound "to use only ordinary care to provide plaintiff a reasonably safe place in which to work" (R. 688). That Court held that petitioner "was bound to exercise ordinary care only to keep the house track in a reasonably safe condition for service" (R. 674). But it approved the charge on the ground that "the instructions taken as a whole did not lead the jury to believe that defendant was an insurer of the safety of the place to work" (R. 674, 678, 698).

(4) Petitioner moved the trial Court to set aside the verdict because it was "deprived of a fair trial" by misconduct of respondent's counsel in making to the jury appeals to passion and prejudice which were specified in the motion (R. 642, 657-666). The Court denied that motion (R. 667). On appeal to the Minnesota Supreme Court petitioner assigned error in enter-

ing judgment upon and refusing to set aside the verdict because of misconduct of respondent's counsel in making "prejudicial, inflammatory and unwarranted" statements to the jury which "deprived defendant of a fair trial and subjected it to findings on all the issues by a jury actuated by passion and prejudice" (R. 688). The Supreme Court declared that "little justification" could be made of parts of the argument of respondent's counsel to the jury; held the verdict excessive "because of passion and prejudice"; and required respondent to consent to its reduction from $27,500 to $22,500 as a condition of its affirmance (R. 676-678, 679). Judgment was then entered in the District Court on the verdict so reduced (R. 683). Petitioner appealed from that judgment assigning error as above (R. 684-692). The judgment was affirmed by final judgment of the Supreme Court (R. 698).

The statutory provision under which the jurisdiction of this Court is invoked is Section 237 of the Judicial Code of the United States as amended by the Act of February 13, 1925, Chapter 229 (43 Stat. 937).

Cases believed to sustain the jurisdiction are:

Ark. Cattle Co. *v.* Mann, 130 U. S. 69.
Seaboard Air Line *v.* Horton, 233 U. S. 492.
Atlantic Coast Line R. R. *v.* Burnette, 239 U. S. 199.
C. M. & St. P. Ry. Co. *v.* Coogan, 271 U. S. 472.
Atlantic Coast Line R. R. Co. *v.* Davis, 279 U. S. 34.
Atlantic Coast Line R. R. Co. *v.* Driggers, 279 U. S. 787.
St. L. & I. M. Ry. Co. *v.* Taylor, 210 U. S. 281.

Statement of the Case.

On the day of his accident, February 27, 1928, respondent was the rear brakeman of a way freight train delivering and collecting freight cars and freight. The locomotive was equipped with "flangers" or small snow plows fitted over the pilot for the purpose of removing snow from rails and adjacent flangeways. As stops were made at various stations snow covered passing tracks and house tracks were "flanged out" by the crew.

Stopping at Cloverton they found an empty box car and a box car loaded with ties standing coupled together, in a loading yard, on a house track over which snow had drifted (R. 33, 219). This track connected with a passing track which connected with the main track.

When the train had stopped at Cloverton the head brakeman uncoupled the locomotive and tender, which then moved forward on the main line, next backwards over the passing track and house track switches, and thus onto the house track toward the two cars standing there coupled together (R. 32, 218, 219).

In the meantime, respondent, the rear brakeman, walked across and climbed on top of the box car loaded with ties for the purpose of releasing the hand brake (R. 33). While he was doing so the engine and tender were backing up to couple onto these cars (R. 34, 36). He saw the head brakeman standing on the footboard of the tender signalling that they were going to shove back along the house track (R. 43, 44).

Respondent explained that after backing to the other end of the house track the engineer would stop, let his "flangers" down, and "flange out" this track, meaning in a forward movement of the locomotive (R. 35). Respondent testified that he had no duty to perform in connection with the "flanging" (R. 42, 43). After that operation was completed, he would have duties to perform on the cars in switching out the load of ties and placing it in the train on the main line (R. 42, 43).

Instead of descending from the car after releasing the hand brake, respondent remained standing on top of it as it was backed over a highway crossing (R. 34). He watched the crossing from the top of the car (R. 35). He was injured in falling to the ground from that position when the car was derailed after passing some distance beyond the crossing (R. 37, 231).

Petitioner's evidence tended to show that the derailment was caused by packed snow over the top of the rails (R. 123, 132, 137, 143, 152, 301, 313, 400). Also that there was no ice except on the roadbed beneath the level of the flangeways in which the flanges of car wheels revolve (R. 124, 138, 155, 162, 163, 304). The snow was about to be cleared from the rails by the flanging operation which petitioner had ordered to remedy the dangerous condition (R. 33, 35, 164, 167, 305, 306, 533, 637).

Respondent's evidence was to the effect that the derailment was caused by ice resting on top of the rails with suggested negligence of the section foreman in not reporting it or having it removed (R. 15, 16, 40, 45, 113, 324, 346, 355, 636, 637).

Assigned Errors Intended to Be Urged.

I.

Error in excluding petitioners defense that respondent's injuries were due to his voluntarily electing to exchange a safe for an unsafe place to work.

II.

Error in authorizing the jury to award damages to respondent for injuries caused by an unsafe condition in remedying which he was engaged.

III.

Error in permitting the jury to find petitioner negligent as to the condition of the track without finding that it failed to exercise ordinary care and prudence in that respect.

IV.

Error in allowing judgment against petitioner to be based on a verdict corrupted by passion and prejudice.

ARGUMENT.

I.

Respondent's injuries were due to his voluntarily electing to exchange a safe for an unsafe place to work.

Respondent testified that it was part of his duty to remain on top of the car to "protect" the Main Street highway crossing, near which the car had been stand-

ing, and over which it was pushed by the locomotive (R. 33, 34, 66). To refute that claim petitioner put in evidence Operating Rule 102, providing that:

> "A member of the train or engine crew will protect highway traffic at crossings by preceding each movement over the crossings and see that all highway traffic has been stopped before signalling the engineman to proceed" (R. 637).

Petitioner's General Superintendent testified that it was respondent's duty to comply with Rule 102 by "standing on the highway crossing to protect both the train and the highway travel * * * until the cars had passed over the highway crossing"; also, in view of the intended return movement, that "he should have stayed on the crossing and protected the movement both ways" (R. 499, 500).

Respondent, in rebuttal, testified that the practice and custom of brakemen in going over crossings in small towns like Cloverton was to do as he did; that he had walked over the crossing on his way to the car and nobody was then approaching; that as he stood on the car he could see 5 or 6 blocks in either direction and no one came across; and that the accident occurred about 150 feet beyond the crossing (R. 529-532).

The trial Court charged the jury that "this Rule (No. 102) is not to be considered by you for any purpose" (R. 608).

The Minnesota Supreme Court sustained the trial Court, saying "Upon the record it is doubtful if plaintiff had violated this rule (No. 102), but, if so, such

violation had no causal connection with the injury" (R. 674).

True, if respondent were found to have violated Rule 102 in remaining on top of the car that would not have caused the derailment. But it would establish that petitioner offered him a safe place to do his work of "protecting" the crossing on the solid ground of the highway, and that he voluntarily chose instead to stand on top of a box car being pushed through drifted snow, in a place of obvious danger.

Danger of derailment was obvious. The rails could not be seen where they were covered with snow. It was a place where pulpwood was loaded into cars (R. 341, 342). Pieces of wood or stones might be on the rails, under the snow (R. 190, 191). So too, various kinds of other debris. Also ice, to say nothing of the snow itself in varying and unknown degrees of solidity underneath its surface.

Respondent testified that the snow on this track was 8 to 10 inches high in places (R. 35, 36). He knew the track was about to be "flanged out" (R. 33, 35). In his opinion it needed "flanging" (R. 533). He explained the purpose of "flanging" as being "so the flange of the car won't come in contact with ice or snow and be derailed" (R. 20). Yet he elected to stand on top of a car pushed along this track before it was "flanged out," when the flanges of the wheels inevitably came in contact with ice or snow, with danger of derailment. He did not even protect himself by sitting down so that he could hold on if the derailment came (R. 231, 530).

Atlantic Coast Line *v.* Davis, 279 U. S. 34, 39, held that a railway employee could not recover under this Act because

> "He voluntarily abandoned the safe position on the running board which he at first assumed and placed himself in a position of extreme danger on the 'jack-arm' * * *"

Atlantic Coast Line Ry. Co. *v.* Driggers, 279 U. S. 787, 791, held that a switchman, killed by alleged negligence of his employing Company when he dismounted from a switch engine, could not recover under this Act because he

> "had no duty which required him to dismount from the switch engine at that time, but was supposed to remain on the engine, although it was optional for him to get off and throw the switch."

II.

Authorizing the jury to award damages to respondent for injuries caused by an unsafe condition which he was engaged in remedying.

The principal issue of fact in the evidence was whether the derailment was caused, as petitioner's witnesses testified, by packed snow over the top of the rails (removable by flanging) with no ice excepting on the roadbed beneath the level of the flangeways, or whether it was caused, as respondent's witnesses testified, by ice extending over the top of the rails (not removable by flanging).

The vital significance of that issue was, of course, that petitioner would not be liable to respondent if the derailment was due to snow removable through flanging and he was engaged in the operation of so removing it, by watching the crossing from the top of the car.

The trial Court not only completely avoided any recognition whatever of this defense in charging the jury, but to all intents and purposes authorized the jury to hold petitioner liable regardless of whether this defense was well founded in point of fact.

It did so by merging together petitioner's claim that the derailment was caused by snow and respondent's claim that it was caused by ice so that the jury would understand that the distinction was of no importance; by indiscriminately referring to "ice and snow" as causing the derailment; and by declaring that the main question was whether petitioner was negligent in that it "permitted ice and snow to accumulate upon this track and so rendered it in an unsafe condition" (R. 599).

Assuming that the conjunction "and" in the phrase "ice and snow" might suffice to imply a finding of ice as well as snow contributing to the derailment, such a finding might be based on the fact that ice beneath the level of the flangeways furnished a solid base enabling the overlying snow to resist and derail the car wheels, which condition could and would be remedied by the flanging operation (R. 155, 306).

Petitioner assigned error in that the above part of the charge affirmatively *imposed* on it a legally nonexistent liability for respondent's injuries, if caused

by snow about to be removed through a flanging operation which he was assisting. Having excepted to this part of the charge, petitioner was entitled to relief against the affirmative error thereof, when duly assigned as such. The Minnesota Supreme Court misapprehended this assignment in dismissing it as a mere complaint that the trial Court failed to give an unrequested instruction *excluding* such liability. *Supra*, Jurisdiction (2).

Non-recovery for injuries caused by a dangerous condition claimant was engaged in remedying is a principle of the common law as interpreted by the Federal Courts. Kansas City Southern Ry. Co. *v.* Billingslea, 116 Fed. 335. Therefore it applies under this Act. C. M. & St. P. Ry. Co. *v.* Coogan, 271 U S. 472, 474.

In authorizing the jury to find petitioner liable for such an injury the Court erroneously construed this Act. In the State Courts petitioner asserted its right not to have the Act so construed. *Supra*, Jurisdiction (2). Therefore this Court has jurisdiction. St. L., I. M. & S. Ry. *v.* Taylor, 210 U. S. 281, 293.

III.

Holding petitioner negligent as to the track's condition with no finding of failure to use ordinary care and prudence to keep it reasonably safe.

The trial Court erroneously charged the jury as to the extent of petitioner's duty to have the track in a safe condition.

That duty is defined in Seaboard Air Line *v.* Horton, 233 U. S. 492, 501, thus:

> "The extent of its (the employer's) duty to its employes is to see that *ordinary care and prudence* are exercised to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen." (Emphasis ours.)

This Court there condemned the following charge from which the standard of ordinary care and prudence was omitted (p. 500):

> "It is the duty of the defendant to provide a reasonably safe place for the plaintiff to work and to furnish him with reasonably safe appliances with which to do his work."

That charge was held sufficient ground for reversing the judgment because it (p. 502):

> "imposed upon the employer an absolute responsibility for the safe condition of the appliances of the work, instead of limiting the responsibility to the exercise of reasonable care."

The charge was also condemned because (p. 500):

> "In various other forms the notion was expressed that the duty of defendant was absolute with respect to the safety of the place of work and of the appliances for the work."

So too, in various forms the charge in the present case expressed the notion that the duty of petitioner was absolute with respect to the safety of the place of work.

For instance, the following:

> "The main question before you is first whether or not the defendant Railway Company

was negligent in its failure to keep this house track in a safe condition for use by its employees, in that it, as the plaintiff claims, had permitted ice and snow to accumulate upon this track and so rendered it in an unsafe condition, and that the defendant failed to have proper and timely inspection made of the house track in question and that the defendant Railway Company failed to ascertain whether or not such house track was safe for the passage of cars over that house track" (R. 599).

And the following:

"If * * * it is your opinion that the snow and ice remained on the track a sufficient length of time so that defendant by the exercise of ordinary and reasonable care, should and could have known of such condition, if you find that the defendant had actual notice, that is, real knowledge, of such conditions, and had that knowledge a sufficient length of time before the accident to enable it to remove the same, and you further find that, under such circumstances, the defendant should have anticipated that an accident might happen, *then the defendant would be guilty of negligence*" (R. 601). (Emphasis ours.)

True, this passage mentions "the exercise of ordinary and reasonable care." But this referred only to petitioner's duty to have *knowledge* of the condition of the track. It was not carried over so as to apply to the succeeding clause concerning petitioner's duty to *remedy* the dangerous condition. Petitioner's duty to remedy this condition was made to depend solely

on having knowledge of it long enough before the accident to *enable* it to be remedied, if it should have anticipated that "an accident might happen."

Thus the jury would understand that if petitioner knew of the alleged ice and snow early enough to have made it *possible* to clear the rails before the derailment, not having done so would constitute negligence, if it should have anticipated that "an accident might happen," regardless of whether or not ordinary care and prudence were exercised to clear the rails.

The harm of that erroneous specific instruction was not cured by the general statement at another place in the charge, after other matters had been discussed, that "Negligence is the failure of a person to use that degree of care that an ordinarily prudent person would use and exercise under the same or similar circumstances" (R. 602). Adskim *v.* Oregon & Washington Navigation Co., 276 Pac. 1094, 1098.

Not only was this reference to the care of an "ordinarily prudent person" wholly disconnected from the previous erroneous instruction, but it was given to the jury as a mere generality, an abstract statement of the test of negligence, without any instruction that it was to be applied by the jurors. They would naturally understand that the Court had given that general standard a proper concrete application to this case in its former absolute instruction that petitioner would be negligent in the circumstances there specified.

The qualification that petitioner would be negligent in case it "should have anticipated that an accident *might* happen" (emphasis ours) was in itself erro-

neous. "An accident might happen" in a place safe by all ordinary standards. Precautions must be taken only against such accidents as the usual and common experience of mankind shows are *likely* to happen, as the Supreme Court of Minnesota admitted, but without granting any relief for this manifest error (R. 674).

IV.

Basing the judgment on a verdict corrupted by passion and prejudice.

In N. Y. C. Ry. Co. *v.* Johnson, 279 U. S. 310, 318, judgment for an injured passenger against a railroad company was reversed because counsel's argument to the jury "so plainly tended to excite prejudice as to be ground for reversal." The Court based that decision on the "paramount consideration" that the state is concerned that litigation be "fairly and impartially conducted." It was held to be the duty of the Court on its own motion to "protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion and prejudice."

Enforcement of that principle by this Court would seem particularly appropriate in order to secure uniformity in cases under the Federal Employers' Liability Act. Otherwise judicious advice to a plaintiff to sue in a state whose courts are tolerant of appeals to passion and prejudice may enable him to procure a recovery under that Act which he could not secure in other courts.

We therefore refer to the following efforts of respondent's counsel in this case to procure a verdict

by inflaming the jury with prejudice against railroad corporations, class prejudice of the poor against the wealthy, and special prejudice against petitioner's counsel as craftily concocting a dishonest defense in order to pauperize a poor man.

In addressing the jury respondent's counsel represented railroad companies generally as trying to fasten on injured men fighting for their rights in court "that they are perjurers and liars" (R. 561); referred to "the difficulties of a man single handed fighting a powerful corporation," the "feeling of superiority * * * of men who represent corporations," and the handicaps of a man fighting for "what they call the underdog" (R. 579); described respondent as "giving to this mighty railroad eighteen of the best years of his life" and petitioner as "coming into court to fight that man and send him out of this court-room stamped as a cheat and a fraud" when it "in common decency and common honesty, if they possess it, should pay this man" (R. 580); characterized petitioner's counsel as a "cool, calculating" corporation lawyer (R. 570); stated that in a wide experience respondent's counsel had never seen "as ingenious and dishonest a defense as is put up in this case" (R. 580); intimated that one of petitioner's witnesses did not lie for the reason that its counsel had not had time to "prepare" him for his testimony (R. 567); suggested that a small verdict would "leave this man a pauper and a beggar to go upon the streets" (R. 591); pictured respondent as "dragging himself up to the doors of the factories and workshops of America" in an unsuccessful search

for work (R. 586); and asserted that if the jury returned a verdict for $26,000, meaning no more than that sum, petitioner's counsel would gleefully telegraph the news to headquarters (R. 581).

It is no mere question of misconduct which might or might not have affected petitioner's substantive right to a fair trial. The Minnesota Supreme Court not only declared that "little justification" could be made of parts of the argument, but it expressly found from the entire record that the verdict was rendered by the jury under the actual influence of passion and prejudice against petitioner (R. 676, 678). Tacitly assuming that such passion and prejudice did not affect the jury's findings on the issues of fact as to whether petitioner was under any liability whatever to respondent, but only its finding as to the amount of damages, the Court affirmed the verdict upon condition that respondent accept a reduction of $5,000 (R. 676-678).

Mr. Justice Stone vigorously dissented on the ground that the entire verdict should be set aside. He suggested that petitioner had a right to have a jury "try *all* the issues fairly" (emphasis his) saying:

> "We find in the verdict plain evidence of the influence on the jury of passion and prejudice and in the argument of counsel for plaintiff its probable source. Yet we grant to the aggrieved party but a small portion of the relief such a combination normally demands" (R. 678).

The view of Mr. Justice Stone was in accord with the principle recognized in Arkansas Cattle Co. v.

Mann, 130 U. S. 69, 75, which quoted with approval the following:

> "Where the circumstances clearly indicate that the jury were influenced by prejudice • • • that remedy (remission of part of the damages) cannot be allowed. Where such motives or influences appear to have appeared, *the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their entire finding.*" (Emphasis ours.)

Numerous previous Minnesota decisions are in accord with that view. Masteller *v.* G. N. Ry. Co., 100 Minn. 236; Ewing *v.* Stickney, 107 Minn. 217; Roemer *v.* Schmidt Brewing Co., 132 Minn. 399; Flannery *v.* C., M. & St. P. Ry. Co., 158 Minn. 384, all held that it is *mandatory* to set aside such a verdict. In the first of those cases the Supreme Court ordered a new trial unconditionally, saying (p. 238):

> "We are forced to the conclusion that the verdict of $12,500 is not to be accounted for upon any reasonable basis, and that the jury must have been influenced by passion and prejudice. Such being the case, the reduction of the verdict did not serve to take away the influence which entered into the deliberations of the jury."

Craig *v.* Cook, 28 Minn. 232, suggests what has been regarded as a permissible exception to that rule. It holds that reducing the damages may be a sufficient remedy if the Court feels "satisfied that the verdict of the jury is right, and ought to stand, only that it is

excessive in amount" (p. 263). Of course, if the Court finds the evidence such that a verdict for plaintiff ought to be directed or one for defendant set aside, the only debatable question being the amount of the damages, to order a new trial might seem useless, if the damages are properly reduced.

But in the present case the Court did not suggest that the evidence required a verdict for respondent, nor could this be suggested seriously. It merely declared that the jury's verdict "has committed us to plaintiff's version" (R. 673). We inquire how a verdict admittedly influenced by passion and prejudice can possibly "commit" the Court. The result is that there has been no proper finding that respondent's injuries were caused by petitioner's negligence, either by the Court or by the jury.

A question of procedure was incidentally involved. Petitioner's counsel did not object while respondent's counsel was appealing to the passion and prejudice of the jury. The Minnesota Supreme Court commented on the omission, but held it non-essential in granting relief (though wholly inadequate) because passion and prejudice influenced the verdict. Moreover, this Court holds that in cases under this Act it will not "allow substantive rights to be impaired under the name of procedure." Atlantic Coast Line R. R. *v.* Burnette, 239 U. S. 199; Central Vermont Ry. Co. *v.* White, 238 U. S. 507.

That petitioner did not have a fair trial of the issue of its negligence, *vel non*, is no mere matter of procedure not involving substantive right. The Act is

fundamentally perverted when deliberately stimulated passion and prejudice against a railroad are allowed as a substitute for an impartial finding of negligence, without which the Act contemplates no liability whatever.

Respectfully submitted,

HENRY S. MITCHELL,
Counsel for Petitioner.

JOHN E. PALMER,
JAMES L. HETLAND,
Of Counsel.

November 12, 1930.